



POSTAL REGULATORY COMMISSION

39 CFR Chapter III

[Docket No. PI2021-2; Order No. 5930]

Public Inquiry

AGENCY: Postal Regulatory Commission.

ACTION: Advanced notice of proposed rulemaking.

SUMMARY: The Commission seeks further input from the public about what regulations promulgated by the Commission may be necessary to carry out the requirements of agency law. This document informs the public of this proceeding, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* August 26, 2021.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

In this docket, the Commission seeks further input from the public about what regulations promulgated by the Commission may be necessary to carry out the requirements of 39 U.S.C. 601. Section 601 describes instances when letters may be carried out of the mail, or when the letter monopoly does not apply to a mailpiece. In particular, the Commission seeks to determine whether regulations promulgated by the Commission are needed to carry out those statutory exemptions.

II. Background

The Postal Service has exclusive rights in the carriage and delivery of letters under certain circumstances. This letter monopoly is codified in the Private Express Statutes (PES), which are a group of civil and criminal statutes that make it unlawful for any entity other than the Postal Service to send or carry letters. See 18 U.S.C. 1693-1699; 39 U.S.C. 601-606.¹

Section 601 provides specific instances (exceptions) where letters may be carried out of the mail (*i.e.*, not subject to the letter monopoly). Section 601(a) sets forth the conditions under which a letter may be carried out of the mail, which include requiring that the letter be enclosed in an envelope, that the proper amount of postage is affixed to the envelope, and that the postage is canceled. 39 U.S.C. 601(a).

Section 601(b) provides additional exceptions such that the letter monopoly does not apply to letters charged more than six times the current rate for the first ounce of a Single-Piece First Class Letter or to letters weighing more than 12.5 ounces. See 39 U.S.C. 601(b)(1), (b)(2). The “grandfather clause” in

¹ Although these provisions of the U.S. Code are customarily referred to collectively as the “Private Express Statutes,” they do not all relate to private expresses or prohibit carriage of letters out of the mails.

Section 601(b)(3) references exceptions from prior Postal Service regulations that permitted private carriage as in effect on July 1, 2005. 39 U.S.C. 601(b)(3); *see also* 39 CFR 310.1 and 39 CFR 320.2-320.8 (2005).

Section 601(c), which is the subject of this proceeding, directs the Commission (rather than the Postal Service) to promulgate any regulations necessary to carry out this section. 39 U.S.C. 601(c). This Public Inquiry seeks to answer how the Commission shall meet this statutory requirement.

Prior to the Postal Accountability and Enhancement Act (PAEA) of 2006, the Postal Service issued regulations that purported to suspend the PES.² The PAEA included the term “purport” to describe the Postal Service’s efforts to suspend the PES, reflecting some disagreement between the Postal Service and policymakers about the Postal Service’s authority to promulgate such regulations prior to the PAEA.³ Post-PAEA, the law clearly cedes such authority to the Commission. These regulations defined the term “letter” as “a message directed to a specific person or address and recorded in or on a tangible object,” subject to several provisions. 39 CFR 310.1(a) (2005). The regulations also described several statutory exceptions to the letter monopoly, such as when the letter accompanies and relates to cargo or when a special messenger is used. *See* 39 CFR 310.3 (2005). In addition, the regulations purported to establish administrative suspensions of the PES (39 CFR 310.1(a)(7) n.1, 320 (2005)), including suspensions for certain data processing materials or for extremely urgent letters. *See* 39 CFR 320.2, 320.6 (2005).

² *See* Postal Accountability and Enhancement Act, Pub. L. 109-435, 120 Stat. 3198 (2006); *see also* 39 CFR 310, 320 (2005).

³ *See* H.R. Rep. No. 109-66, 109th Cong., 1st Sess., pt. 1, at 58 (2005) (H.R. Rep. No. 109-66).

These regulations were originally promulgated by the Postal Service in 1974 and were amended several times prior to enactment of the PAEA.⁴ In 2003, the President's Commission on the United States Postal Service recommended that the scope of the letter monopoly should be clarified and periodically reviewed by a Postal Regulatory Board.⁵ In 2006, Congress passed the PAEA, which, inter alia, added new price and weight limits to the postal monopoly, repealed the Postal Service's purported authority to adopt administrative suspension of the monopoly, and repealed the Postal Service's authority to implement provisions of the criminal code defining the scope of the monopoly.⁶

In addition to adding price and weight limits as exceptions (Sections 601(b)(1), (b)(2)), Congress also added a "grandfather clause" in Section 601(b)(3) to authorize the continuation of private activities that the Postal Service had purportedly permitted by regulations to be carried out of the mail. The House Report on the PAEA explains that this paragraph protects mailers and private carriers who had relied upon the regulations adopted as of the date of the bill. See H.R. Rep. No. 109-66 at 58. Congress also eliminated the Postal Service's authority to adopt any regulations creating exceptions or defining the scope of the postal monopoly. See 39 U.S.C. 401(2), 404(a)(1), 601. Congress instead gave the Commission the authority to promulgate "[a]ny regulations

⁴ See Comprehensive Standards for Permissible Private Carriage, 39 Fed. Reg. 33211 (Sept. 16, 1974).

⁵ Report of the President's Commission on the United States Postal Service, *Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service*, July 31, 2003, at 71 (President's Commission). The President's Commission recommended "transforming the narrowly focused Postal Rate Commission [] into an independent Postal Regulatory Board." *Id.* at XIII.

⁶ See H.R. Rep. No. 109-66 at 57. Congress stated that "the bill clarifies the scope of the statutory monopoly that historically has been defined solely by the [Postal Service]." *Id.* at 58.

necessary to carry out this section [601].”⁷ To date, the Commission has not promulgated any regulations pursuant to Section 601(c).

In Docket No. RM2020-4, the Commission issued an advance notice of proposed rulemaking to seek input from the public about what regulations promulgated by the Commission may be necessary to carry out the requirements of 39 U.S.C. 601.⁸ In particular, the Commission sought comments on fourteen issues, such as whether the statutory requirements of Section 601 are clear and concise, whether any terms in the statute required further definition, and whether consumers and competitors can easily determine when a mailpiece is subject to monopoly protections. Order No. 5422 at 7-8.

Prior to the comment deadline, the Commission issued two Chairman’s Information Requests, regarding certain Postal Service regulations.⁹ In its response, the Postal Service explained that it had not issued regulations or other administrative directives in connection with Sections 601(b)(1) and (2) since the effective date of amended Section 601(b).¹⁰ The Postal Service also provided information regarding alternative payment agreements pursuant to 39 CFR

⁷ 39 U.S.C. 601(c). See Docket Nos. MC2012-14 and R2012-8, Order Approving Addition of Valassis Direct Mail, Inc. Negotiated Service Agreement to the Market Dominant Product List, August 23, 2012, at 6-7 (Order No. 1448) (citing Section 601(c) and stating that the Postal Service no longer has authority to issue regulations interpreting or defining the postal monopoly); see also Docket No. MC2012-13, Order Conditionally Granting Request to Transfer Parcel Post to the Competitive Product List, July 20, 2012, at 6-7 (Order No. 1411) (“As a result of the PAEA, the Postal Service no longer has authority to issue regulations interpreting or defining the postal monopoly. The Commission now has the authority to promulgate such regulations.”). Order No. 1411 at 7 n.13.

⁸ See Docket No. RM2020-4, Advance Notice of Proposed Rulemaking to Consider Regulations to Carry Out the Statutory Requirements of 39 U.S.C. 601, February 7, 2020 (Order No. 5422).

⁹ Docket No. RM2020-4, Chairman’s Information Request No. 1, March 4, 2020 (Docket No. RM2020-4, CHIR No. 1); Docket No. RM2020-4, Chairman’s Information Request No. 2, April 1, 2020 (Docket No. RM2020-4, CHIR No. 2).

¹⁰ Docket No. RM2020-4, Responses of the United States Postal Service to Questions 1-3 of Chairman’s Information Request No. 1, March 11, 2020, question 1 (Docket No. RM2020-4, Response to CHIR No. 1).

310.2(b).¹¹ In addition, the Postal Service provided information regarding advisory opinions pursuant to 39 CFR 310.6. Docket No. RM2020-4, Response to CHIR No. 1, question 2.

Comments were received from The Berkshire Company; Taxpayers Protection Alliance; American Consumer Institute Center for Citizen Research; United Parcel Service, Inc.; FedEx Corporation; Netflix, Inc.; Small Business & Entrepreneurship Council; the National Postal Policy Council and the National Association of Presort Mailers; the Association for Postal Commerce; the Postal Service; and the Public Representative.¹² Based on the comments received, the Commission found it necessary to gather more information from the public before promulgating regulations under Section 601 and therefore, that proceeding is held in abeyance until the conclusion of this inquiry.¹³

III. Discussion

In this proceeding, the Commission seeks to focus its inquiry on the statutory exemptions in Sections 601(a) and (b), and what regulations under Section 601(c), if any, are needed to carry out those exemptions. In particular,

¹¹ Docket No. RM2020-4, Response to CHIR No. 1, question 3; *see also* Response of the United States Postal Service to Chairman's Information Request No. 2, April 3, 2020, question 1 (Docket No. RM2020-4, Response to CHIR No. 2).

¹² Docket No. RM2020-4, Comments of The Berkshire Company in Response to Order No. 5442, April 6, 2020; Docket No. RM2020-4, Comments of Taxpayers Protection Alliance, April 6, 2020; Docket No. RM2020-4, Comments of American Consumer Institute Center for Citizen Research Regarding Docket No. RM2020-4 Submitted to the United States Postal Regulatory Commission, April 6, 2020; Docket No. RM2020-4, Comments of United Parcel Service, Inc. on Advance Notice of Proposed Rulemaking to Consider Regulations to Carry Out the Statutory Requirements of 39 U.S.C. § 601, April 7, 2020; Docket No. RM2020-4, Comments of FedEx Corporation, April 7, 2020; Docket No. RM2020-4, Comments of Netflix, Inc., April 7, 2020; Docket No. RM2020-4, Comments of Small Business & Entrepreneurship Council, April 7, 2020; Docket No. RM2020-4, Comments of the National Postal Policy Council and the National Association of Presort Mailers, April 7, 2020; Docket No. RM2020-4, Comments of the Association for Postal Commerce, April 7, 2020; Docket No. RM2020-4, Comments of the United States Postal Service in Response to Order No. 5422, April 7, 2020; Docket No. RM2020-4, Public Representative Comments, April 7, 2020.

¹³ Docket No. RM2020-4, Order Holding Rulemaking in Abeyance, July 2, 2021 (Order No. 5929).

the Commission limits this inquiry to two issues: (1) whether Postal Service regulations administering current Sections 601(a), 601(b)(1), and 601(b)(2) should be adopted by the Commission; and (2) what private carrier services are within the scope of Section 601(b)(3).

First, the Commission is interested in identifying Postal Service regulations that administer Sections 601(a), 601(b)(1), and 601(b)(2) and if the Commission should adopt them. Section 601(a) provides for the private carriage of letters when, among other things, the letter is in an envelope that is properly addressed, the proper amount of postage is affixed to the envelope, and the postage is canceled in ink by the sender. 39 U.S.C. 601(a). Sections 601(b)(1) and (b)(2) further provide that a letter must meet price and weight requirements in order to be carried out of the mail. 39 U.S.C. 601(b)(1), 601(b)(2).

Prior to the PAEA, the Postal Service issued regulations concerning the restrictions on the private carriage of letters. Several of these regulations were modified and superseded by the adoption of the PAEA. For example, the PAEA supersedes a Postal Service regulation that allows private carriage if the amount paid is “at least three dollars or twice the applicable U.S. postage for First-Class Mail (including priority mail) whichever is greater.” 39 CFR 320.6(c). In addition, a Postal Service regulation closely tracks the language in Section 601(a) but also allows for alternative payment agreements in written agreements between customers and the Postal Service. 39 CFR 310.2(b). The Commission is specifically interested in whether certain Postal Service regulations implement the current statutory exemptions found in Sections 601(a), 601(b)(1), and 601(b)(2), and whether the Commission should adopt or revise these and other regulations to clarify the statutory exemptions.

Second, the Commission is interested in identifying what private carrier services are within the scope of Section 601(b)(3). See 39 U.S.C. 601(b)(3). The “grandfather clause” in Section 601(b)(3) authorized the continuation of private activities that the Postal Service had purportedly permitted by regulations to be carried out of the mail. Specifically, it allows private carriage that is within the scope of specific purported suspensions to the letter monopoly. 39 CFR 310.1 (2005) included twelve putative exceptions to the definition of “letter” and/or purported suspensions of the letter monopoly. 39 CFR 320.2-8 (2005) provided seven additional purported suspensions of the PES, including for certain data processing materials, for certain letters of college and university organizations, and for certain international-ocean carrier-related documents. The Commission seeks comments on what services were “described by regulations of the United States Postal Service . . . that purport to permit private carriage by suspension of the operation of this section” as of July 1, 2005. See 39 U.S.C. 601(b)(3). Additionally, the Commission seeks suggestions regarding what regulations may be needed to enumerate in clear terms all instances where private carrier services are within the scope of Section 601(b)(3).

For both issues, the goal of the Commission is to determine whether it is necessary to clarify the statutory exemptions regarding the letter monopoly. The Commission seeks information as to how best to resolve any ambiguities in the application of the exceptions. The Commission also inquires whether consolidating regulations and definitions under one section, rescinding redundant and/or conflicting sections, or standardizing the terminology used in the regulations would be helpful.

IV. Comments

The Commission invites interested persons to identify whether there are any Postal Service regulations that the Commission should adopt to carry out the requirements of Section 601 and if so, whether the Commission should revise those regulations. In addition, the Commission seeks comments that identify what private carrier services are within the scope of Section 601(b)(3) and whether regulations are needed to clearly enumerate those services. Commenters are encouraged to provide specific suggestions on revisions or recommend new regulations.

The Commission recognizes that comments on these issues have been provided in Docket No. RM2020-4. However, given the length of time since those comments were received and the breadth of different topics covered by the previous advance notice of proposed rulemaking, the Commission finds it prudent to solicit updated comments to assist in focusing this proceeding on a few particular issues. Commenters who previously submitted comments in Docket No. RM2020-4 may provide updated comments in this proceeding. The Commission envisions that the comments provided in this proceeding will help inform any proposed rules that may be issued in Docket No. RM2020-4.

Comments are due August 26, 2021. Material filed in this docket will be available for review on the Commission's website, <http://www.prc.gov>.

Pursuant to 39 U.S.C. 505, Kenneth E. Richardson will serve as the officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

V. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. PI2021-2 for the purpose of considering potential regulations under 39 U.S.C. 601.

2. Interested persons may submit written comments on potential regulations no later than August 26, 2021.

3. Pursuant to 39 U.S.C. 505, Kenneth E. Richardson will serve as the officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

4. The Secretary shall arrange for publication of this Notice in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

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